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In the Supreme Court
of the United States

OCTOBER TERM, 1970

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, et al,
Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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The petitioners Brotherhood of Locomotive Firemen & Enginemen, et al (certain officers were named as co-defendants), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 23, 1970.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. No opinion was rendered by the District Court of Oregon.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 23, 1970. This petition for certiorari was filed within 90 days of that date, as extended by order of this Court. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Where an interstate carrier, without following the Railway Labor Act procedure, unilaterally changes long established work rules and working conditions which are not covered by a collective bargaining agreement, and such change takes work away from the members of one union and gives it to members of another union, can it be said that the former union's grievance is a minor dispute subject to injunction?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45:

Section 156

Carriers and representatives of the employees

shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. . . .

United States Code, Title 29:

Section 108

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

STATEMENT OF THE CASE

This is a suit by an interstate railroad to enjoin the petitioner union from striking, and to recover damages in the event of a strike after a hearing in the District Court, the preliminary injunction was allowed.

Respondent Union Pacific Railroad Company's Oregon division employs several hundred firemen, whose certified collective bargaining representative is petitioner Brotherhood of Locomotive Firemen & Enginemen ("Firemen's Union" herein). The company

also employs locomotive engineers, whose representative is respondent Brotherhood of Locomotive Engineers ("Engineers' Union" herein).

All members of both unions begin their employment as locomotive firemen. Some firemen then take the necessary examinations and are qualified as engineers. When they achieve sufficient seniority, they are regularly assigned as engineers. However, until they achieve such seniority, firemen qualified as engineers are classified "demoted engineers," and shuttle back and forth between the work of the two crafts, depending upon the needs of the company. The Firemen's Union is the certified collective bargaining representative of the demoted engineers.

This dispute centers on the priority between demoted engineers and regular engineers in the assignment of extra engineering work. Whenever the company finds that any particular roster of engineers is exhausted, and a need for engineers exists, a regular engineer is called from the "extra board," a roster of regular engineers eligible for normal work assignment. When the "extra board" is exhausted, and a need for engineers remains, it has been the *unvarying practice for over twenty years* for the company to give first call to demoted engineers. This has resulted in a substantial amount of engineering work for employees represented by the Firemen's Union.

Until February, 1968, neither the agreement between the Firemen's Union and the company or the agreement between the Engineers' Union and the

company covered the priority of assignment in this situation. On February 15, 1968, the company and the Engineers' Union renegotiated their agreement to provide, among other things, that the first call in this situation would go not to demoted engineers, but to regular engineers who are observing "days off" or who have already worked that day, and that demoted engineers would be called only if no such off-duty engineers could be obtained. No notice of the impending change or negotiations, as provided by 45 U.S.C. § 156, was given the Firemen's Union, although the Firemen's Union has bargaining authority for this work and its members would be directly affected by the company-engineers agreement. The Firemen's Union threatened to strike if the 1968 agreement was implemented as scheduled on March 1, 1968. The company brought this suit to enjoin the threatened strike, and sought damages as well as permanent and preliminary injunctions. After hearings, the lower court found on March 4 that the "controversy over which said strike is threatened is a minor dispute within the meaning of the Railway Labor Act." The court enjoined the petitioner Firemen's Union and its members from striking, and the Ninth Circuit affirmed.

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts with the decisions of this Court.

The Ninth Circuit has disregarded the plain teachings of this Court. It has thrust the arm of government into the determination of a major labor dispute, and has tipped the scales against working men trying to protect their livelihood.

This Court has consistently recognized that the Norris-LaGuardia Act "was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 203; the Court has stated that Congress used unmistakable and broad language "because it believed previous measures looking toward the same policy . . . had been given unduly limited construction by the courts." *Order of Railroad Teleg.* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 336. The Court has warned against and rejected a judicial construction designed to effectuate a "partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this county's labor legislation as the Norris-LaGuardia Act." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 203.

This Court has clearly stated the basic idea underlying the distinction between major and minor disputes:

"In general, the difference is between what

> are regarded traditionally as the major and the minor disputes of the railway labor world. The former present the large issues about which the strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. . . ."
>
> "The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment." *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. at 723, 724.

Can it be said that a change of procedure of 22 years standing, whereby a substantial amount of extra work given to members of one union is taken from them and given to members of another union, is a "smaller difference" which "arises incidentally in the course of employment"? Can it be said that the failure to give any notice of such a significant change, despite statutes requiring such, is simply a "maladjustment" of an "individual quality"? Can it be said that there is a "relative improbability" of a strike in such a situation? Certainly not. This dispute is of the sort that invariably leads to disruption of labor-management relations.

The lower court's "answer" to the undeniable logic of *Burley* is that the dispute is minor because it "involves either a construction of B.L.F. & E.'s contract or a matter of work assignment priorities and thus is either a minor dispute with the railroad, or a jurisdictional dispute. . . ."

To say that this dispute involves "petitioner's contract with the company" is to read provisions into the contract which do not exist. Petitioner's agreement contains no provision whatsoever as to the priority of work assignments between demoted engineers, whom petitioner represents, and regular engineers, who belong to the other union. Further, petitioner's complaint that it was given no notice of this change affecting it is not based on contract, but on statutory law, that is, the Railway Labor Act.

To classify this as a possible "jurisdictional dispute" is to ignore the fact that the dispute is not over who *represents* men at work, but over the conflicting claims of two different groups of men to the right to work.

To classify this as a minor dispute because it involves "work-assignment priorities" is to defy the teachings of *Burley*. A dispute between men over a substantial amount of work is a dispute vital to both sides. When an employer sides with one group against the other in a vital dispute such as this, without any notice to the other, it must know that the group discriminated against will seek to employ the most effective means of protecting its livelihood, and that

means is the strike, the vital bargaining tactic that the Norris-LaGuardia Act is designed to preserve. The Ninth Circuit has tipped the scales against the petitioner's members in disregard of the policy of law and the teachings of this Court.

2. The dispute is vital to a large number of people.

This is obvious; the principal parties here are a large carrier and a large union. The controversy involves a good deal of human livelihood. It deserves a place on the docket.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

Union Pacific Railroad brought this suit to enjoin the Brotherhood of Locomotive Firemen & Enginemen (BLF&E) from striking. BLF&E has taken this appeal from preliminary injunction issued by the District Court. The issue is whether the underlying controversy between the union and the railroad is a major or a minor dispute; if the dispute is a major one, the Norris-LaGuardia Act, 29 U.S.C. §§ 101-107, protects the strike from a federal court's injunction.

By agreement in 1968 between Union Pacific and intervenor, Brotherhood of Locomotive Engineers (BLS), the work week of engineers reduced to five days, and the manner in which extra engineering work was to be assigned under these new conditions was spelled out. BLF&E contends that this method is contrary to that formerly practiced and serves to reduce the opportunity of certain firemen (designated "demoted engineers" and members of BLF&E) to serve as engineers.

Before the District Court BLF&E contended that the railroad's new agreement with BLE was contrary to provisions of the BLF&E agreement. The District Court ruled that such a dispute would be resolved by construction of the BLF&E contract and thus was a minor dispute within the exclusive jurisdiction of the National Railroad Adjustment Board, and that injunction was proper.

Before this court BLF&E also contends that the

railroad, by its agreement with BLE, has accomplished a change in working conditions of firemen and has refused to bargain with BLF&E respecting these changes; that the dispute thus is a major dispute which the District Court had no power to enjoin.

It is clear that the dispute involves either a construction of BLF&E's contract or a matter of work-assignment priorities and thus is either a minor dispute with the railroad, *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 722-24 (1945), or a jurisdictional dispute, essentially with BLE, over which employees shall receive an assignment of certain work. *Transportation-Communication Employees* v. *Union Pacific R.R.*, 385 U.S. 157 (1966). Under either approach the resolution of the dispute is within the exclusive jurisdiction of the National Railroad Adjustment Board and injunction against the strike was proper. *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); *Switchmen's Union* v. *Southern Pacific*, 398 F.2d 443 (9th Cir. 1968).

The order of the District Court is affirmed.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition on Behalf of Respondent Union Pacific Railroad Company

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 423 F. 2d 673 (March 23, 1970), and is printed in the Appendix to the Petition. While the District Court for the District of Oregon did not render a formal, written opinion, the trial Judge expressed his conclusions orally from the bench; and the Preliminary Injunction entered March 4, 1968 (from which the appeal was taken) made findings that are pertinent here; and therefore the District Court opinion

and the Preliminary Injunction are reproduced in the Appendix to this brief (infra pp. A1-A11).

JURISDICTION

Respondent does not dispute this court's jurisdiction to review the judgment of the Court of Appeals by writ of certiorari, although the pertinent statute is 28 USC 1254(1), rather than 28 USC 1257(3) as cited by petitioner (Pet. p. 2).

QUESTIONS PRESENTED

Respondent does not accept the statement of the Question Presented by petitioner, because the question of a unilateral change in work rules or working conditions was not the basis for the firemen's strike, and it was not the issue in the trial court. As pointed out in the opinion of the Court of Appeals, the issue in the trial court was whether implementation of an agreement between the railroad and the engineers' union violated an agreement between the railroad and the firemen's union (423 F. 2d at p. 674). That this was the basis claimed for the strike has at all times been admitted (Compl. Par. VI(a), R. 9-10; admitted by counsel at Tr. 60);[1] and it was affirmatively so testified by a representative of petitioner (Tr. 70-71). See also Exhibit 4, p. 9.

Therefore, respondent submits that a more accurate statement of the Questions Presented is as follows:

---

(1) Page references to the Record refer to the Record as filed with the Court of Appeals. Page references to the Transcript refer to the reporter's transcript of the trial court proceedings.

1. Where a union representing one class of employees of a railroad institutes a strike, and in the District Court attempts to justify the strike solely on the ground that its collective bargaining agreement would allegedly be violated by implementation of a new agreement between the railroad and a union representing another class of employees, and the District Court issues a preliminary injunction on the basis that a strike for such reason is unlawful, may the union on appeal then attempt to justify its strike on the basis of other reasons and grounds which it had not previously raised?

Only if the answer to the first question is in the affirmative is a second question presented as follows:

2. When a railroad, pursuant to a demand which has been served and progressed by a union which is the duly designated representative of its engineer employees, enters into an agreement concerning the working conditions of its engineer employees with said engineers' union but without negotiation with the union representing its firemen employees, is the firemen's union entitled under the Railway Labor Act to institute a strike against the employer railroad because the railroad's new agreement with the engineers' union will alter prior practices with respect to the priority of assignment of employees represented by the firemen's union to work as extra engineers?

STATUTES INVOLVED

Various portions of the Railway Labor Act are pertinent, in addition to the portions quoted by petitioner:

Major Disputes:[2]

45 USC § 152:

* * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

* * *

45 USC § 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

---

(2) The designations of "major disputes" and "minor disputes" do not appear in the Railway Labor Act, but have been adopted by court decisions over a period of many years as a convenient way to distinguish between disputes involving the making or changing of agreements and those involving interpretation of or grievances under existing agreements. See cases cited infra page 25.

Minor Disputes:[2]

45 USC § 152:

* * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

* * *

45 USC § 153:

* * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by peti-

tion of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

* * *

STATEMENT OF THE CASE

In this case respondent, Union Pacific Railroad Company (herein "UPRRCo." or "the railroad") obtained a preliminary injunction from the District Court of Oregon against a threatened strike by the petitioner, Brotherhood of Locomotive Firemen & Enginemen (herein "BLF&E" or "firemen's union"). Respondent, Brotherhood of Locomotive Engineers (herein "BofLE" or "engineers' union") intervened in support of the railroad's position. Petitioner appealed from the preliminary injunction, and the Court of Appeals affirmed.

In essence, this case is really a dispute between the firemen's union and the engineers' union over which union has the right to bargain with respect to the assignment of extra engineers' work created by adoption of a five-day week instead of a six-day week for yard engineers. The subject was covered by an agreement between the company and the engineers' union, which was the bargaining representative for engineers' work; but the firemen threatened to strike if the contract was put into effect. If the company had refused to put into effect its contract with the engineers, it would have been subject to strike by the engineers, so the company was helpless between the upper and nether millstones.

1. Basic Union Agreements

In order to understand the background of the dispute, it is necessary to review briefly the basic union agreements, and to correct certain inaccuracies in the petition for certiorari. It is admitted in the record that the engineers' union is duly certified as the collective bargaining representative of plaintiff's employees in the craft or class of locomotive engineers, including those engineers who are members of the firemen's union and not of the engineers' union (Compl. Par. V-(b)-(1), R. 7-8; admitted at Tr. 60). The firemen's union is the duly certified collective bargaining representative for the class or craft of firemen (Compl. Par. IV-(a), R. 5; admitted at Tr. 60). The agreement with the engineers is in evidence as Exhibit 1, and the agreement with the firemen is Exhibit 2.

It must be remembered that in the railroad industry a union bargains for a craft or class of work, rather than just for its members. Thus in the engineers' agreement, Art. 38, Sec. 18 says: "The General Committee of Adjustment, Brotherhood of Locomotive Engineers, will represent all locomotive engineers . . ." (Ex. 1, p. 50). And in a corresponding provision, Art. 38, Sec. 18 of the firemen's agreement says: "The General Committee of the Brotherhood of Locomotive Firemen and Enginemen, will represent all locomotive firemen . . ." (Ex. 2, p. 55). The engineers' union has no authority to bargain for firemen's work; and the firemen's union has no authority to bargain for engineers' work.

Thus the petition is somewhat misleading in stating that "The Firemen's Union is the certified collective bargaining representative of the demoted engineers" (Pet. p. 4). When a promoted fireman (or demoted engineer) is serving as a fireman, he is under the firemen's agreement; but when he is serving as an engineer, he is under the engineers' agreement, and represented for collective bargaining purposes by the engineers' union.

The petition is also incorrect in stating that "All members of both unions begin their employment as locomotive firemen" (Pet. p. 4). While many engineers do begin as firemen, this is not necessary; and both agreements contemplate that engineers may either be hired directly as engineers or promoted from the ranks of firemen. Article 40 in each of the agreements provides; in substantially similar fashion, for the promotion and hiring of engineers and firemen; and Art. 40, Sec. 8 of the engineers' agreement (Ex. 1, pp. 62-3) and Art. 40, Sec. 9 of the firemen's agreement (Ex. 2, p. 69) both provide for a ratio to be maintained between promoted and hired engineers.

Both agreements also contain an identical clause dealing with the use of demoted engineers in emergency, and this clause was originally the source of the firemen's claim in this case:

> "USE OF DEMOTED ENGINEERS, EMERGENCY: When necessary in cases of emergency to use demoted engineers as engineers, the senior demoted engineer available at the home terminal for extra men will be used, except that when call is

made to fill a vacancy as engineer at an outside point, at which point there is a senior demoted engineer, such senior demoted engineer at the outside point, if available, will be used to fill vacancy as engineer."

(Ex. 1, Art. 39, Sec. 11, p. 58; Ex. 2, Art 39, Sec. 12, p. 63)

Note that this clause specifies which demoted engineer will be used, when it is necessary in cases of emergency to use demoted engineers; but it does not define an emergency, nor say when it will be considered necessary to used a demoted engineer in an emergency.

It is the company's position that there is no emergency within the meaning of the clause quoted above, unless all other methods for securing engineers under all applicable agreements have been exhausted, and no engineer is available under any of such agreements. Under this interpretation it is perfectly proper for the company and the engineers' union to agree upon procedures for filling engineers' vacancies, and so long as someone is available under any of such procedures, there is no emergency so as to invoke the above clause. It is only when all other procedures have been exhausted that there is an emergency requiring use of the senior demoted engineer (see Carrier's Submission to NRAB, Ex. 4 herein, pp. 11-12).

Illustrations of this are the agreement of May 28, 1965, between the company and the engineers' union establishing a Rotary Pool Board (Ex. A to Carrier's

Submission to NRAB, which is Ex. 4 herein; also introduced as Ex. 21) and the agreement of June 1, 1965 between the company and the engineers' union establishing procedures for filling vacancies in the Rotary Pool Board (Ex. B to Carrier's Submission to NRAB, which is Ex. 4 herein). Under the rotary pool agreement, when the engineers' extra board is exhausted the pool of regularly assigned engineers is rotated, and it is only when that pool is also exhausted that demoted engineers are called (Tr. 151-153).

Another illustration is the "doubling agreement" with the engineers, dated December 21, 1966, which was received as Exhibit 28. Under the doubling agreement, when the extra board is exhausted, an extra engineer who has finished a job on the previous shift is given the opportunity to "double through", or work another shift, before the senior available demoted engineer is called (Tr. 148-9).

Therefore, the petition is not correct in stating that: "When the 'extra board' is exhausted, and a need for engineers remains, it has been the *unvarying practice for over twenty years* for the company to give first call to demoted engineers" (Pet., p. 4, italics in original). While it may be, as testified by some witnesses, that as demoted engineers they were called to serve as engineers when the extra board was exhausted, there is nothing in the record to show whether or not, at such times, there were any other applicable agreement procedures,

or any engineers available under such procedures. Hence that evidence was meaningless.

2. The Five-day Week Agreement

A 1952 national agreement with the engineers' union provided for establishment of a five-day work week for yard engineers, beginning at such time as that portion of the agreement became effective on any carrier (see recitals at beginning of Ex. 3). In 1967 negotiations began between the company and the engineers' union with respect to putting the five-day week into effect, in accordance with the national agreement (see Carrier's Submission to NRAB, Ex. 4 herein, pp. 5-6). This culminated in an agreement dated February 15, 1968, effective March 1, 1968, establishing the five-day week for yard engineers at certain yards in the company's Oregon Division. This agreement is Exhibit 3 herein, and is also attached to the Carrier's Submission to NRAB, which is Exhibit 4 herein.

Naturally, the change from a six-day week to a five-day week created additional positions for yard engineers, even though the total volume of work remained the same. Thus, at the Albina yard (Portland), it opened up positions for eight additional engineers, who had previously been assigned as firemen (Tr. 155). And by enlarging the total number of engineer positions, it increased the possibility of vacancies requiring the use of additional men as engineers when the extra board was exhausted.

To establish a procedure for filling such vacancies, the agreement provided as follows:

"Section 8. In circumstances where the yard engineers' extra board or extra boards protecting yard service are exhausted and the exigencies of the service require the use of additional engineers, vacancies, except as provided in Section 7 hereof, shall be protected in the following manner—

FIRST: By using the senior available regularly assigned engineer observing his 'days off' and who has eight hours to work under the Hours of Service Act; provided, however, the senior available regularly assigned engineer has filed a written application with the crew dispatcher to be used on the work day immediately preceding his 'days off.'

SECOND: By using the senior available regularly assigned engineer on his designated work days; provided, however, that such regularly assigned engineer has—

(a) worked on that day;

(b) has eight hours available to work under the Hours of Service Act; and,

(c) has filed written application with the crew dispatcher to be used in extra service, and that such use will not prevent service on his regular assignment.

THIRD: By using the senior available demoted engineer.

NOTE: In the application of this Section 8, an engineer making written application with the crew dispatcher to be used in yard service on his 'days off' must keep himself available for such service and for failure to either protect or be available for yard service on his 'days off,'

> such engineer shall not thereafter be considered eligible for yard service on his 'days off' in that work week if there are other available regularly assigned engineers who can be called to protect the requirements of the service." (Ex. 3, pp. 6-7.)

This was not a "renegotiation" of the engineers' agreement, as asserted by the firemen's union (Pet., p. 5), nor a departure from prior practice, but it was merely an implementation of the five-day week agreement. The firemen have attempted to treat Section 8 as if it were independent and unrelated to anything else (and as if it were something punitive directed against the firemen), completely ignoring the fact that it was part of the five-day week agreement, to which the company was committed as a result of the 1952 national agreement. Since the additional engineers' vacancies would result from the five-day week agreement, it was perfectly natural and proper that the method of filling those engineer vacancies should be included in the same agreement with the engineers' union.

The priority established was to use: first, regularly assigned engineers on their days off; second, regularly assigned engineers on their designated work days; and third, demoted engineers. This followed the pattern of the rotary pool agreement (Ex. 21), under which both the extra board and the entire pool of regularly assigned engineers must be exhausted before demoted engineers are called, and also the doubling agreement (Ex. 28), under which extra engineers are allowed a second shift

before demoted engineers are called. And since it dealt solely with engineers' work, it was within the bargaining authority of the engineers' union, contrary to the statement in the petition (p. 5).

The disputed provision did not deprive any fireman (or demoted engineer) of any work that he previously had, since the extra positions created by the five-day week did not previously exist. Instead, the agreement created additional job opportunties for firemen who could then move up to engineers' positions. And those who did not have enough seniority to hold engineers' positions still had their regular positions as firemen.

3. The Threatened Strike

The firemen's union objected to Section 8 of the engineers' five-day week agreement, contending it violated Article 39, Section 12, of their agreement, dealing with the use of demoted engineers in emergency (quoted *supra*, p. 8); and they threatened to strike if the engineers' agreement was placed in effect as scheduled on March 1, 1968. The strike has been admitted (Compl. Par. VI-(a), R. 9; Tr. 60, 70). The strike was to occur on March 1, 1968, when the engineers' agreement was to go into effect (Ex. 4, pp. 9-10). The basis for the strike was explained by Mr. Kenyon, Vice President of the BLF&E, as follows:

> "* * * we advised the railroad as far back as January 30th, by me to Mr. Beckley, that it would be a direct violation of the Firemen's Agreement, Article 39, Section XII, if Section VIII of the 5-day work week agreement, as written, went into effect.

And, in order to protect the people we represent, we would strike if that happened * * *" (Tr. 70.)

4. Submission to the Adjustment Board

On being faced with a strike, the company on February 26, 1968, submitted the dispute to the National Railroad Adjustment Board as provided in the Railway Labor Act (45 USC § 153). A copy of the Carrier's Submission to the NRAB is attached to N. B. Beckley's affidavit in support of the Motion for an Order to Show Cause (R. 36), and is also in evidence herein as Exhibit 4. Receipt of the submission is evidenced by the letter from the NRAB dated February 27, 1968, which is Exhibit 5. The circumstances of the strike threat are detailed in the submission (Ex. 4, pp. 6-10). It will be noted that in submitting the dispute to the NRAB, the company advised that while the parties to the dispute were the company and the firemen's union, the dispute also involved the engineers' union, and the Board was requested to give due notice to that organization. Therefore the rights of all interested parties could be protected by the NRAB.

5. Proceedings in This Case

The Complaint in this case was filed on February 27, 1968 (R. 1); and instead of seeking a temporary restraining order without notice, the company filed a Motion for an Order to Show Cause, for a Temporary Restraining Order and for a Preliminary Injunction (R. 31). The Order to Show Cause was granted (R. 73), returnable on February 29, 1968, and it was served along

with the Motion, and with the Summons and Complaint. The engineers' union filed a Motion to Intervene with a Complaint in Intervention (R. 76).

On February 29, 1968, the matter came on for hearing with both unions and the company represented. The engineers' intervention was allowed (Tr. 6, R. 76), and the engineers have admitted all allegations of the Complaint (Tr. 65). The firemen brought into court a draft of an Answer, but it was not ready to be filed, and they withheld filing it at that time (Tr. 59, 65-7). Instead, counsel for the firemen stated in open court their admissions and denials of the Complaint (Tr. 59-61).

The hearing continued on February 29, March 1 and 2, 1968, during which time the threatened strike was postponed by agreement of counsel (Tr. 12, 49, 56-7). There was little actual dispute in the trial court that an injunction was proper, and the principal controversy centered on whether conditions should be attached to the injunction that would prevent the company from putting into effect the disputed portion of the agreement with the engineers' union, pending resolution of the basic dispute under the processes of the Railway Labor Act. Thus, the initial statement of counsel for the firemen's union was:

> "MR. McEWEN: If the Court please, I posed to Counsel for the carrier that the Court enter an injunction with a status quo provision which would permit the agreement made with the Engineers, scheduled to go into effect March 1, 1968, to go into effect with all its provisions with the exception of Paragraph VIII." (Tr. 2, cf. Tr. 65, 66-7.)

The trial court, after weighing the equities, concluded that a status quo provision would not be appropriate (Tr. 162-3; Prelim. Inj., Par. 6, R. 91) and the firemen's union has not challenged that ruling.

There was also considerable discussion between the Court and counsel with respect to the possibility of referring the entire dispute to an arbitrator under the auspices of the National Railroad Adjustment Board. When this proved fruitless, a limited amount of testimony was taken, and the Court announced his decision from the bench, granting the Preliminary Injunction (Tr. 162, Appendix, *infra*, p. A7). It had been stipulated that the Order, when issued, would be a Preliminary Injunction, rather than merely a Temporary Restraining Order (Tr. 61-64).

The firemen's Answer was not actually filed until March 5, 1968, after the injunction had been issued. Included in the Answer was a counterclaim, and the Trial Court has ordered, based upon a stipulation, that the company need not respond to that counterclaim until 10 days after the determination of the appeal from the Preliminary Injunction (Order April 29, 1968). The latter Order was not included in the Record in the Court of Appeals, so it is printed in the Appendix to this brief, *infra*.

Included in the firemen's counterclaim, for the first time, were the contentions that the company should have negotiated with the firemen before making the

five-day week agreement with the engineers, and that such agreement made a unilateral change in the firemen's working conditions without having followed the bargaining procedures required under the Railway Labor Act.

As pointed out above, however, this was not the basis for the threatened strike, it was not an issue before the trial court, and the contentions were not made until after the Preliminary Injunction had already been issued. The basis for the strike, and the only attempted justification for it in the trial court, was that the engineers' agreement in fact conflicted with the firemen's agreement—which the trial court held to be a matter of contractual interpretation for the Adjustment Board.

In the Court of Appeals, the firemen urged the new contentions based upon its counterclaim; but the Court of Appeals held that the controversy was either a matter of contractual interpretation, and hence a "minor dispute", or it was a matter of work-asignment priorities and essentially a jurisdictional dispute between the firemen and the engineers. In either event the dispute was within the exclusive jurisdiction of the Adjustment Board, and an injunction against the strike was proper. Therefore, the Preliminary Injunction was affirmed, and the petition for certiorari was filed.

SUMMARY OF ARGUMENT

When the strike was called the only reason asserted for it was a claimed conflict between a work-assignment provision in the engineers' agreement and a provision

in the firemen's agreement relating to the use of demoted engineers in an emergency. This was also the basis for the attempted justification of the strike in the District Court. The grounds now asserted by petitioner—that the railroad's agreement with the engineers effected a unilateral change in the firemen's working conditions, without notice to or bargaining with the firemen—were not the basis for the strike, nor were they at issue in the District Court. The propriety of the preliminary injunction must be determined on the basis of the grounds asserted for the strike; and certiorari should not be granted to review a preliminary injunction when the issue sought to be presented has not been litigated in the trial court.

The work assignments in question were extra jobs as yard engineers. Since the engineers' union was the certified bargaining representative for engineers' work, the company was required to bargain with the engineers' union over that work; and the firemen's union was not entitled to notice of those negotiations nor to participate in them, even if the agreement so concluded had an indirect effect on job opportunities for members of the firemen's union.

The Court of Appeals correctly concluded that the dispute was either: (1) a matter of contract interpretation and hence a "minor" rather than a "major" dispute under the Railway Labor Act; or (2) a jurisdictional dispute over which employees should be assigned to certain work. In either event the dispute is to be re-

solved under the exclusive procedures of the Railway Labor Act, and it could not lawfully be the subject of a strike.

Even if the firemen could have made the subject matter into a "major" dispute by following Section 6 procedures, they did not do so; and in the absence of those procedures, the issue could not lawfully be the subject of a strike.

Since the strike was in violation of the mandatory processes of the Railway Labor Act, the prohibition of the Norris-LaGuardia Act did not apply, and the preliminary injunction did not conflict with prior decisions. Therefore certiorari is not warranted.

ARGUMENT

1. The firemen's union cannot now urge reasons to justify the strike that were not asserted at the time the strike was called, nor presented to the trial court.

As pointed out in our Statement of the Case, the sole basis for the threatened strike, and the only attempted justification for the strike at the hearing on the Preliminary Injunction, was the claim that implementation of Section 8 of the five-day week agreement between the company and the engineers (quoted *supra*, p. 12), would conflict with Article 39, Section 12 of the firemen's agreement (quoted *supra*, p. 8). The trial court correctly ruled that this presented only a question of contract interpretation; and that under the uniform decisions of this court under the Railway Labor Act, questions of contractual interpretation are "minor dis-

putes" and within the exclusive jurisdiction of the National Railway Adjustment Board (see cases cited *infra*, p. 25).

The attempt by the firemen to convert what was otherwise clearly a minor dispute into a major dispute by claiming that the engineers' agreement amounted to a unilateral change in the firemen's work rules which was not covered by agreement, was clearly an afterthought, raised for the first time by the counterclaim that was not filed until after the Preliminary Injunction had been issued. Since no reply has yet been filed to the counterclaim (the time for doing so having been extended until after disposition of the appeal from the Preliminary Injunction), this matter has never been at issue; and the question attempted to be presented by the petition for certiorari has never been ruled on by the trial court.

The propriety of the preliminary injunction must be based upon the situation presented to the trial court at that time, rather than on some later theory developed for purposes of appeal. Illustrative of this point is the case of *Norfolk & PBLR Co. v. Bro. R. T.*, 248 F. 2d 34 (CA 4, 1957), c.d. 355 U.S. 914. In that case the BofRT threatened a strike over the carrier's establishment of an additional point for reporting and relief. In the initial stages the union claimed that under existing agreements such action could not be taken without its consent, while the carrier claimed the right to do so as a

management prerogative. Since this involved the interpretation of existing agreements, it was a minor dispute (248 F. 2d at p. 43). However, the union claimed that at some point in the proceedings it had changed its position; and conceding that management had the right to make the change, it contended that it was in fact bargaining for a new agreement to cover matters resulting from that change—thus creating a major dispute although it had not been processed as such. The court held that the dispute must be considered in its original nature, saying:

> "If by a tardy change in its legal position a party could convert a 'minor dispute' processed through the procedures applicable only to those disputes, into a 'major dispute' fully processed, the mandatory provisions of the Act in aid of settlement of 'major disputes' would be circumvented and the public denied those safeguards against interruptions of service, the establishment of whcih was the major purpose of the Act. The concession of the Brotherhoods to the legal position of the carrier upon the 'minor issue' may have made moot the pending proceeding before the Adjustment Board, but it cannot leave them free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a 'major dispute' under the required procedures of the Act." (248 F. 2d at 45-46.)

The question of whether the strike was enjoinable depends on the nature of the dispute over which the strike was threatened; and we submit that certiorari should not be granted to review a preliminary injunction, when the reasons for now opposing the injunction

were not the basis for the strike, and those reasons have never been litigated in the trial court.

2. The preliminary injunction is not in conflict with prior decisions.

(a) The Norris-LaGuardia Act does not prohibit an injunction against a railroad strike, when the strike would be unlawful under the Railway Labor Act.

It is now well settled that the anti-injunction provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115) must be accommodated to the later and more specific provisions of the Railway Labor Act (45 U.S.C. §§ 151-188, portions quoted *supra*, p. 4), and that the Federal courts may grant injunctive relief to vindicate the processes of the Railway Labor Act, when the threatened strike would be unlawful under it. *BofRT v. Chicago River, etc. R. Co.*, 353 U.S. 30, 1 L. Ed. (2d) 622, 77 S. Ct. 635 (1957), and cases therein cited, 353 U.S. at 41-2.

Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 8 L. Ed. (2d) 440, 82 Sup. Ct. 1328 (1962), cited by petitioner, is not to the contrary. *Sinclair* did not involve the Railway Labor Act, and it expressly distinguished *Chicago River* on the ground that the Railway Labor Act, unlike the Taft-Hartley Act, mandates an exclusive method of settling disputes over the interpretation of railroad labor agreements (370 U.S. at 210-212).

Order of Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330, 4 L. Ed. (2d) 774, 80 S. Ct. 761 (1960), cited by petitioner, applied the prohibition of Norris-

LaGuardia, because the dispute was held to be a "major" one under the Railway Labor Act. In that case the union was seeking an amendment to an existing contract and had served a Section 6 notice (45 U.S.C. § 156) asking for the amendment, so that it had followed the procedures for a major dispute. In the present case the firemen have not served a Section 6 notice, and they have not followed the procedures of a major dispute so as to make this issue ripe for a strike, in any event.

(b) The dispute was a minor one, under the Railway Labor Act, and the strike was therefore enjoinable.

Petitioner has treated the distinction between "major and minor" disputes as if the determining factor was the relative importance of the subject matter to the parties. This is an incorrect approach, as the distinction is qualitative, not quantitative; and it relates to the *nature* of the dispute, not just its impact.

Under the Railway Labor Act a "major dispute" is one which relates to the formation of collective bargaining agreements or an attempt to change such agreements. Such a dispute arises when carriers and their employees fail to agree on "rates of pay, rules and working conditions" for the future for a craft or class of employees. Under Section 152-Seventh, no such agreement can be changed except in the manner provided in the agreement or in the Act, and Section 156 establishes the statutory procedure for such changes. A "minor dispute" is one involving the interpretation or application of an existing agreement, and such disputes are gov-

erned by Section 152-Sixth and Section 153-(i). Each type of dispute has a separate statutory route to follow, and for each type that route is exclusive and mandatory.

Major disputes proceed through the National Mediation Board, with possibly a Presidential Emergency Board; and when all procedures of the Act have been exhausted, then the parties may resort to self-help. *Order R. Telegraphers v. C. & N.W. Rwy. Co.*, 362 U.S. 330, 4 L.Ed. (2d) 774, 80 S. Ct. 761 (1960); *Bro. of Loc. Engrs. v. B.&O. R. Co.*, 372 U.S. 284, 9 L. Ed. (2d) 759, 83 S. Ct. 691 (1963).

With respect to minor disputes, the procedure leads to the National Railroad Adjustment Board; and the decisions of that Board are final and binding, as a type of compulsory arbitration. Since the Adjustment Board procedure is exclusive, it is illegal to resort to strike activity in connection with such a dispute, and such a strike is enjoinable. *BofRT v. Chicago River & I.R.* 353 U.S. 30, 1 L.Ed. (2d) 622, 77 S. Ct. 635 (1957); *BofLE v. M-K-T R. Co.*, 363 U.S. 528, 4 L. Ed. (2d) 1379, 80 S. Ct. 1326 (1960); *BofLE v. L&N R. Co.*, 373 U.S. 33, 10 L.Ed. (2d) 172, 83 S. Ct. 1059 (1963).

As a corollary to the rule that minor disputes are reserved exclusively for the Adjustment Board, it is settled that the courts have no jurisdiction to interpret railroad labor agreements. *Order of Conductors v. Pitney*, 326 U.S. 561, 90 L. Ed. 318, 66 S. Ct. 322 (1946); *Slocum v. Delaware, etc., R. Co.*, 339 U.S. 239, 94 L.Ed. 795, 70 S. Ct. 577 (1950); *Order of Conductors v. South-*

ern Ry., 339 U.S. 255, 94 L. Ed. 811, 70 S. Ct. 585 (1950); *Transp.-Comm. Emp. Union v. Union Pacific*, 385 U.S. 157, 17 L.Ed. (2d) 264, 87 S. Ct. 369 (1966) reh. den. 385 U.S. 1032.

And when the question is whether the carrier's action falls within its managerial prerogatives under an existing agreement, or requires an amendment to the agreement, this is a matter of interpretation which is itself a minor dispute. *Norfolk & PBLR Co. v. BRT, supra*, 248 F. 2d 34, 41-3 (CA 4, 1957), c.d. 355 U.S. 914; *Rutland Rwy v. BLE*, 307 F. 2d 21, 36 (CA 2, 1962), c.d. 372 U.S. 954; *Ill. Cent. R. v. BRT*, 398 F. 2d 973 (CA 7, 1968).

If the present dispute is viewed in the light in which the parties regarded it at the time of the threatened strike—and in the light in which it was submitted to the trial court—then there can be no doubt that it was a minor dispute. It involved merely the question of whether the engineers' five-day week agreement conflicted with the firemen's agreement, and this was obviously a question of the interpretation and application of the existing firemen's agreement. The firemen in effect conceded that this was a minor dispute.

However, even if the firemen's new contentions are considered in determining the nature of the dispute, it is submitted that the dispute is still a minor one. Their present contentions are based on the assumption that the engineers' five-day week agreement effected a change in the firemen's working conditions; but whether or not it did effect such a change in turn depends upon

the interpretation and application of the firemen's agreement.

There is a basic inconsistency in the firemen's present arguments. On the one hand they contend that the engineers' agreement took away from the firemen (or demoted engineers) a substantial amount of extra work and gave it to the members of another union (Pet. p. 7). But on the other hand they assert that the firemen's contract does not deal with priority of work assignments between demoted engineers and regular engineers (Pet. p. 8). If they did not have a right to the priority, it is difficult to see how the engineers' agreement could be regarded as taking it away.

If the firemen are attempting to distinguish between working conditions existing by contract and those existing by practice, it must be observed that the changes in working conditions as to which notice must be given are only those embodied in agreements. Section 6 (45 U.S.C. § 156, quoted *supra*, p. 4) requires 30 days' notice only of "an intended change in agreements." See: *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 at 402-3, 86 L.Ed. 914, 62 S. Ct. 659 (1942); *ORC v. Pitney*, *supra*, 326 U.S. 561, at 565; *Norfolk & PBLR Co.*, *supra*, 248 F. 2d 34 at 41. And the *status quo* provisions of Section 6 apply only under certain conditions, which do not exist here. cf. *Detroit, Toledo etc. R. Co. v. U.T.U.*, 396 U.S. 142, 24 L.Ed. (2d) 325, 90 S. Ct. 294 (1969).

While practice may be a useful aid in interpreting an ambiguous agreement, practice alone does not create or

constitute an agreement. And if a union wants to amend an agreement so as to give contractual stature to an existing practice, then it must proceed as for a change in the agreement under Section 6, which the firemen have not done in this case.

When practice is offered as interpreting an agreement, then the matter is peculiarly within the expertise of the Adjustment Board. As this court said in *Slocum v. Delaware, supra*:

> "The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." (339 U.S. at 243.)

The case of *CMStP&P v. BofLF&E*, 397 F. 2d 541 (CA 7, 1968) c.d. 393 U.S. 1022, is remarkably similar to the present situation. In that case there had been a tripartite agreement between the company, the firemen's union and the engineers' union (the same unions involved in this case) regarding work assignment seniority between engineers and firemen. Under that agreement an engineers' extra board had been abolished, the extra engineers formerly on that board were given work as fire-

men, and when extra engineers' work was available, the senior available firemen would be called. The engineers gave notice to cancel the agreement under its terms, and to restore the engineers' extra board. The firemen objected and invoked the services of the Mediation Board. After the Mediation Board terminated its services, the company submitted the dispute to the Adjustment Board, and the company advised that the engineers' extra board would be restored. The firemen commenced picketing, and the company sought an injunction.

The firemen's original objection to cancellation of the tripartite agreement had been on the basis that their consent was necessary—similar to their original objection here that the engineers' five-day week agreement violated the firemen's agreement. But since that was a matter of contractual interpretation, it was obviously a minor dispute.

The firemen next contended that while the company may have had the right to terminate the agreement, it did not have the right to re-establish the extra board (thus imposing new working conditions) without making a new agreement with the firemen or exhausting the major disputes provision of the Railway Labor Act. This is similar to the firemen's present contention in this case, that by entering into the engineers' five-day week agreement the company has changed the firemen's working conditions unilaterally and without bargaining with them.

The court held that it was a minor dispute and subject to an injunction, saying:

> "In our opinion a dispute as to whether a termination of the 1956 agreement has the effect of restoring the engineers' extra board at Three Forks, and whether such a restoration constitutes a 'new' working condition, presents only issues which are to be resolved by reference to and interpretation of the related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true where a jurisdictional dispute over work assignments is involved. . . ." (citing *Transportation Wkrs. v. U.P.*, 385 U.S. 157) (397 F. 2d at 545)

Another very similar case was *N.Y. Cent. v. Bof-LF&E*, 355 F. 2d 503 (CA 7, 1966). In that case, like this, the firemen claimed that their agreement obligated the company to use available qualified firemen as engineers, when the engineers' extra board was exhausted; and the engineers claimed that under the emergency provisions of their agreement engineers who had exceeded their maximum mileage could be called back and utilized as engineers in lieu of calling the senior available qualified firemen (similar to Section 8 of the engineers' agreement in this case). The firemen called a strike, the company submitted the dispute to the Adjustment Board, and the company sued to enjoin the strike. As here, the engineers intervened.

The trial court granted the injunction, but imposed a condition requiring the company to call the available qualified firemen before recalling engineers, on the ground that this would make the practice uniform with

the rest of the district. On appeal the injunction was affirmed, the court saying:

> "The appeal contains no serious attack on the District Court's right to issue the injunction. The issues of the dispute are cognizable by the National Adjustment Board and therefore, the Court had the power to grant injunctive relief to preserve the jurisdiction of the Board . . ." (355 F. 2d at 505).

The principal question on appeal related to the condition included in the injunction, which was held to be discretionary. In the present case the trial court in the exercise of his discretion declined to attach such a condition, and that ruling has not been challenged on appeal, so that portion of the decision is inapplicable. But the decision clearly holds that a dispute which is almost identical with the one in this case is a minor dispute for the Adjustment Board.

A somewhat similar question was again presented in *Switchmen v. Southern Pacific*, 398 F. 2d 443 (CA 9, 1968). In that case the company and the yardmasters' union entered into an agreement providing for yardmasters' seniority in the event of a transfer from one yard to another. The switchmen's union claimed that this conflicted with their agreement whereby switchmen had the exclusive right of promotion to yardmaster and whereby a yardmaster had seniority as such only in the yard where promoted. The company took the position that the switchmen's agreement did not apply to the incident in question, because it involved a transfer from one yard to another rather than a promotion

within the yard. The court held that the controversy was a minor dispute and affirmed an injunction against a strike.

The fact that the firemen's agreement does not specifically cover the subject does not mean that action by the company, within the area thus left open, is an attempt to change working conditions so as to become a major dispute. Thus in *Ill. Cent. R. v. BofLF&E*, 332 F. 2d 850 (CA 7, 1964), c.d. 379 U.S. 932, the company designated a new tie-up point and the union demanded transportation to the new point. There was no agreement requiring such service, and no agreement forbidding or restricting the company from changing tie-up points. The court held that it was a minor dispute and enjoined a strike, saying:

> "Under the circumstances here involved the change in the tie-up point did affect 'working conditions' but it involved a matter of working conditions omitted from the contracts and in the absence of a Section 6 notice as a foundation for negotiations to add a provision or provisions to the existing collective bargaining agreements concerning the facilities to be furnished at, or transportation to be furnished from, tie-up points, the dispute over the matter remained a minor dispute." (332 F. 2d at 853.)

In the present case, the company's position is that the engineers' five-day week agreement does not in fact change the firemen's agreement or their working conditions, as it deals only with engineers' work that is within the bargaining authority of the engineers' union.

But if it does affect the firemen, it is in a manner contemplated by the firemen's agreement, in that the firemen's agreement leaves open for management decision, or to be determined by agreement with the engineers, the question of when an emergency exists so as to require the use of the senior demoted engineer.

Thus in making the agreement with the engineers, the company contends that it was proceeding in a manner permitted by the firemen's agreement. Whether it is correct in that position depends on the construction of the firemen's agreement, in the light of established practices, and this is a minor dispute for determination by the Adjustment Board.

(c) Even if the dispute was major it could not legally be the subject of a strike, since the procedures of the Act had not been followed by the firemen's union.

The purposes of the Railway Labor Act include the following:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;
>
> * * *
>
> "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
>
> "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working condition." (45 U.S.C. § 151 a.)

Regardless of whether the dispute is major or minor, the Act contemplates that its prescribed procedures will be followed, in order to effectuate the foregoing purposes. If the parties were at liberty to ignore those procedures, then the entire scheme of the Act would be frustrated.

Even though, in the case of a major dispute, the parties may ultimately be free to resort to self-help after all the procedures of the Act have been exhausted, it is first necessary to exhaust those procedures. Thus in *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 89 L.Ed. 534, 64 S. Ct. 413, 150 A.L.R. 810 (1944), the court, in discussing major disputes, said:

> "* * * The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help * * *" (325 U.S. at 725).

And in *Bro. of L.E. v. B.&O.R. Co.*, supra, the court said:

> "The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here * * *"
> * * *
> "* * * What is clear, rather, is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board * * *" (372 U.S. at 290, 291.)

Previously we have mentioned the failure of the firemen's union to pursue Section 6 procedures, as showing that the dispute was really a minor one, rather than major. If the firemen had considered this to be a subject requiring an amendment or addition to their agreement, it is reasonable to suppose they would have initiated Section 6 proceedings. And while the mere giving of a Section 6 notice would not convert what is really a minor dispute into a major dispute, the failure to give a Section 6 notice is hardly consistent with the firemen's claim that it was a major dispute.

At this point the absence of a Section 6 notice is significant for an additional reason: because even if it was a major dispute, the failure to proceed under Section 6 was a failure to pursue the statutory remedy, and without having done so the union cannot resort to self-help. *Norfolk & PBLR v. BRT*, *supra*; *Ill. Cent. R. v. BofLF&E*, *supra*.

(d) The firemen's union was not entitled to notice or negotiation with respect to an agreement affecting assignment of extra engineer work, as the company could deal only with the union certified to bargain for that work.

The Act requires the company to "treat with" the union that is certified as the bargaining representative for the particular craft or class of employees. Sec. 152 - Ninth. Under the principles of *Virginian Ry. v. System Federation*, 300 U.S. 515, 548, 81 L.Ed. 789, 57 S. Ct. 592 (1937), the carrier must bargain with the duly authorized representative, *and no other*.

The firemen now contend that the company violated the Act by not giving them notice and bargaining with them regarding the alleged change in working conditions (Pet. p. 8). However, any change in working conditions which resulted from the engineers' five-day week agreement was a matter relating wholly to the work of yard engineers. That work was within the bargaining authority of the engineers' union, and not of the firemen's union. It has been admitted that the engineers' union is the duly certified bargaining representative for *all* engineers, even those who are members of the firemen's union (Compl. Par. V-(b)-(1), R. 8; Tr. 60). Therefore the company could not lawfully have negotiated with the firemen's union regarding engineers' work, and the firemen were not entitled to notice.

The case of *ORCB v. SUNA*, 269 F. 2d 726 (CA 5, 1959), c.d. 361 U.S. 899, illustrates the point. In that case, the railroad had entered into an agreement with SUNA governing the scope of yard work over which SUNA had bargaining jurisdiction. Since this agreement affected work practices of road men represented by ORC&B and BRT, those organizations sought to declare the agreement invalid because the railroad failed to give them notice and bargain with them. The court, however, in rejecting this contention, held that BRT and ORC&B were not entitled to notice or to bargain because those rights pertained only to the certified bargaining representative.

(e) Since this is essentially a representational or jurisdictional dispute between unions, it must be determined under the processes of the Railway Labor Act and may not be the subject of a strike.

The classification of certain disputes as major or minor does not necessarily encompass all possible types of controversy. Cf. *BRT v. NY Cent. R.*, 246 F. 2d 114 (CA 6, 1957), c.d. 355 U.S. 877.

For example, the Railway Labor Act recognizes and makes provision for those disputes which are essentially between unions over the right to bargain for particular classes of work. Section 152-Fourth provides that a majority of any "craft or class of employees" shall have the right to determine who shall represent such craft or class. Section 152-Ninth provides that in case of a dispute among employees as to who are their representatives, the National Mediation Board shall certify the bargaining representative; and after receipt of such certification, the carrier "shall treat with the representative so certified."

It is settled that the jurisdiction of the NMB to determine bargaining representation is exclusive, and the courts have no jurisdiction to interfere with such certification. *SUNA v NMB*, 320 U.S. 297, 88 L. Ed. 61, 64 S. Ct. 95 (1943); *Gen'l Com. v. M-K-T*, 320 U.S. 323, 88 L. Ed. 76, 64 S. Ct. 146 (1943); *Gen'l Com. v. S.P.*, 320 U.S. 388, 88 L.Ed. 85, 64 S. Ct. 142 (1943); *So. Pac. v. SUNA*, 356 F. 2d 332 (CA 9, 1966); *BofLF&E v. L.&N.R. Co.*, 400 F. 2d 572 (CA 6, 1968), c.d. 393 U.S. 1050.

And where a jurisdictional dispute requires the interpretation of labor agreements in order to resolve the claims of competing unions, the controversy is a "minor dispute" and is within the exclusive jurisdiction of the Adjustment Board. *ORC v. Pitney*, 326 U.S. 561, 90 *L.Ed.* 318, 66 S. Ct. 322 (1946); *Slocum v. Delaware, etc.*, 339 U.S. 239, 94 L.Ed. 795, 70 S. Ct. 577 (1950); *Transp.-Com. Union vs. U.P.RR. Co.* 385 U.S. 157, 17 L.Ed. 2d 264, 87 S. Ct. 369 (1966).

Reduced to essentials, this case is really a dispute between the two unions as to which one has the right to bargain with respect to extra engineers' work. The firemen claim that vacancies created by the five-day work week for yard service engineers should be filled by demoted engineers, now serving as firemen. The engineers claim that such vacancies should be filled by regularly assigned engineers, so long as any are available, before resorting to the demoted engineers now serving as firemen. The company's position is that it has no choice but to bargain with the engineers' union on the subject, since it is the certified bargaining agent for engineers' work.

The question of bargaining rights would appear to be settled by the admitted certification of the engineers' union to represent all engineers. But if there were any doubt or dispute with respect to which union has the bargaining rights, that question would have to be resolved under the administrative processes of the Act, rather than by a threat of strike.

IN CONCLUSION

It is submitted that the Court of Appeals correctly evaluated the situation. This is either a minor dispute relating to contract interpretation, or it is a jurisdictional dispute over work assignments. In either event the Act provides exclusive means for resolving the dispute, and it was not a proper subject for strike action. And even if it could have a major dispute, involving a change in or addition to the firemen's agreement, it was not so treated; and in the absence of Section 6 procedure the strike was still unlawful. Hence the preliminary injunction was clearly proper, and there is no conflict with prior decisions. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Trial Court's oral opinion ..... (Tr. 162-168)

Preliminary Injunction ..... (R. 89-93)

Order extending time to respond to counterclaim, April 29, 1968.

* * * *

THE COURT: My function here is a limited one. All the cases indicate that I can just do certain things. I am not to determine the validity of this agreement or decide this dispute. I am required to yield to the expertise of the people in the Railway Adjustment Board or the National Mediation Board.

I am concerned with the national interest. Where a strike is threatened which affects the national interest, I have the privilege and duty of insuring that the national interest will be protected. I think it is clear that if either labor organization is permitted to strike, it will create an intolerable situation; great damage would result, and needed war materials which are being shipped over this line would stop.

I have concluded that this is a proper case to grant an injunction even though I don't like injunctions. An injunction should be issued in unusual cases and only when there is a great danger of irreparable damages. It was with this in mind that I listened to the testimony.

I have looked at the cases from the Court of Appeals and the Supreme Court. They say the status quo shall be maintained when there would be a dislocation of employees from their homes; where there would be loss of jobs and where the changes would have some catastrophic results.

I find that if the contract negotiated in February of 1968, is not permitted to go into effect on March 1, 1968, the additional jobs for firemen are few in number. But

if the contract is permitted to go into effect, a number of men will get increases in salary. I believe the daily rates will increase from $2 to $5. I also find that eight firemen will be put on the regular board as engineers but no fireman will lose his job. Every fireman will have the opportunity to work.

If the firemen ultimately prevail, the Union Pacific Railroad will have to pick up the check. I realize that may require some time. But, this is not a situation in which we will throw a group of firemen out of work. Here firemen will be able to continue to work.

If I maintain the status quo we will prevent some firemen from getting jobs as engineers and a large group of men will be deprived of an increase which they bargained for. The increases are substantial. It is the difference between $26 and $33 according to the rates given me by the man from the Firemen's Union. The highest rate was $30.11. I notice that the new rate will be $36.51.

In view of all these circumstances and trying to weigh the equities, I must enjoin the firemen from striking to prevent this contract from going into effect, without passing upon the validity of that contract. That is why I was critical of Don Richardson's attempt to put in evidence about the contract, because I don't want to decide that issue. I don't want to prejudge the case. I want to let the Railroad Adjustment Board—the people who have the knowledge and the expertise—make that determination without any help from me. It may require

some time. I understand it will take a year before the firemen can demand that the matter go before a Special Board. I was hoping that we could have solved it some other way but I failed to get the necessary cooperation. Therefore, there is nothing more for me to do. I cannot tell the Board any more.

I share the view that was expressed to me by some firemen and some engineers that Paul Hanlon would be a fool to take this assignment in view of the attitude of these two unions. He is a friend of mine. I know he is a friend of the lawyers. To put a man in that position for a $100 a day would be a terrible thing to do to him. He would have to come here from Boston and then get himself in bad with one union or the other. That is one reason why I concluded I should take him off this hook and let the Board select a man.

Having made that statement, Mr. Richardson, do you want to put on some more testimony?

MR. RICHARDSON: The Intervenor rests its case, your Honor.

THE COURT: That is my decision. I don't suppose you want to put any more evidence on?

MR. KESTER: No, your Honor.

THE COURT: It is a temporary restraining order Mr. McEwen. I don't know whether you want to concede that if additional testimony is adduced that I would issue a permanent injunction to the same effect. But I will not ask you to make a decision now. Under the law,

you have the privilege of appealing at this time. There is nothing to prevent you from appealing to the Court of Appeals.

MR. McEWEN: Well on this point, your Honor, it's my understanding we all stipulated this morning to this being merely a temporary restraining order.

THE COURT: I will not issue a temporary restraining order. I will issue a temporary injunction.

MR. McEWEN: We agree to that.

THE COURT: You have asked for some affirmative relief. You did not want the matter to be finally determined, I am just stating that you are privileged to appeal my decision. I don't know what the engineers will do. If you can find a man who is foolish enough to accept this arbitration, and the engineers will agree, I don't see any reason why the carriers shouldn't agree.

MR. KESTER: We would be happy to have the thing resolved once and for all if that can be done.

THE COURT: I am not going to require anyone to make a determination now. In view of that fact, no one other than the carrier will be required to put up a bond. Do you have a form of injunction that is appropriate?

MR. KESTER: I have prepared several different forms during the last week. But, at the moment, none of them quite fits this situation. So, I'd better redraw it again and submit it to your Honor on Monday.

MR. McEWEN: Your Honor, I would ask the Court about its ruling. I believe I can be mistaken, but the Court intended to make some findings and conclusions. I think they have to be made.

THE COURT: I think they have to be made on a restraining order. As to whether they have to be made on a preliminary injunction or not—

MR. KESTER: The form of order which I originally submitted had some findings. I would expect to incorporate those same findings in the revised order that I will present.

THE COURT: Let me take a look at your temporary restraining order.

MR. KESTER: The original order did not take into account the fact the Engineers' Union is now a party and intervenor. One of the orders I submitted had the status quo part in it. So, it would probably be better if I revised it and presented it without having crossed out the things on this copy.

THE COURT: When do you want this to go into effect?

MR. KESTER: Well, I assume there will be no problem of a strike between now and the time that the Court could sign the order. I can present the order sometime Monday.

THE COURT: I will issue the injunction right now. I will enjoin the members of the BLF&E from striking or

counseling a strike or engaging in a slowdown. Then Monday morning, if you will present the order, I will sign it. But, I think it would be advisable to show it to Mr. McEwen and Mr. Richardson first. Maybe they will have no objection.

MR. KESTER: As soon as I can get the necessary typing done, I will give copies to counsel. Your Honor, it may be in the afternoon.

MR. RICHARDSON: I assume from what the Court has said, the BLE is free now to ask the carrier to implement the February 15, 1968, agreement?

THE COURT: What do you mean by implement?

MR. RICHARDSON: Well, you will recall, in view of what the Court has said on Thursday when we were thinking about presenting the controversy to Mr. Hanlon, the Court hasn't signed any restraining order, as I understand it, at all. The full effect of the agreement was stayed at the time they recalled this bulletin.

THE COURT: They can issue the bulletin.

MR. RICHARDSON: That's what I mean. We can proceed as soon as reasonably practical with the implementation of the agreement.

THE COURT: Yes.

MR. KESTER: If it is agreeable to the Court, I would suggest, perhaps, our representative and the General Chairman of the Engineers could agree between themselves on a new effective date for the 5-day agree-

ment to go into effect. Having in mind the mechanical problems of implementing it, they might want to agree among themselves what effective date it would be.

MR. RICHARDSON: There will be no problems on that.

THE COURT: All right. Then if there is nothing else, we will recess until Monday morning at 9:00

(Whereupon the afternoon adjournment occurred.)

PRELIMINARY INJUNCTION

This cause came on for hearing on the 29th day of February, 1968, and continued thereafter until and including the 2nd day of March, 1968, upon the Order to Show Cause entered herein on the 27th day of February, 1968. Plaintiff appeared by its attorneys, defendant Brotherhood of Locomotive Firemen and Enginemen (herein referred to as BLF&E) appeared by its attorney, certain of the individual defendants appeared by their attorney, and intervenor, Brotherhood of Locomotive Engineers (hereinafter referred to as BLE) appeared by its attorney. The court considered the allegations of the verified complaint, the affidavit of N. B. Beckley, and testimony and other matters presented by the respective parties; and it was stipulated that the cause should be deemed to be submitted on plaintiff's motion for a preliminary injunction. Based thereon, the court now finds:

(1) The court has jurisdiction of the parties and of the subject matter,

(2) Defendants have threatened to commence a strike against plaintiff's railroad at such time as plaintiff and intervenor place into effect their agreement dated February 15, 1968 providing for a five-day work week for yard service engineers;

(3) The controversy over which said strike is threatened is a minor dispute within the meaning of the Railway Labor Act; it is within the exclusive jurisdiction of the National Railroad Adjustment Board; it has been submitted to and is now pending before said Board; and a strike over said matter is therefore unlawful;

(4) Such a strike would stop all of plaintiff's rail operations in its Oregon Division and would impair rail operations on the rest of plaintiff's system; it would cause immediate and substantial damage to plaintiff, much of which would be irreparable and not compensable in money; and such a strike would also be contrary to the public interest and to the national welfare in that it would interfere with rail transportation over a wide area, within and between the states, and it would impede the transportation of persons and property, thereby damaging passengers, shippers and consignees of plaintiff and of connecting carriers and the public generally.

(5) Greater injury would be inflicted upon plaintiff if injunctive relief were denied than would be inflicted upon defendants if such relief were granted;

(6) It would not be equitable to require that effectiveness of said agreement of February 15, 1968 be postponed as a condition of the issuance of this injunction.

Now, therefore, it is hereby ORDERED that defendants and each of them, and all officers, agents and members of defendant BLF&E and its local lodges, and all persons acting in concert or participating with them, or any of them, are hereby RESTRAINED and ENJOINED until further order of this court, from:

(a) Calling, authorizing, encouraging, commencing, continuing or participating in any strike, work stoppage, slow down, cessation of work or other collective or concerted action designed to interrupt, retard or in any way to impair the operation of trains or the transportation of passengers or property on plaintiff's railroad lines or any part thereof, including calling, authorizing, encouraging, commencing, continuing or participating in any collective or concerted action in laying off or attempting to lay off allegedly on account of sickness or refusing or failing to report for work by reason of alleged sickness;

(b) Picketing, bannering or sign-posting any premises on which plaintiff conducts its railroad business or operations;

(c) Interfering with ingress to or egress from such premises;

(d) In any manner interfering with or affecting the orderly continuance of work on plaintiff's railroad lines or inducing or endeavoring to induce any person employed by the plaintiff from performing his work and duties and from in any manner endeavoring to induce any such employee to desist therefrom;

(e) Inducing, individually or collectively, any other employee or class or group of employees of the plaintiff to perform any of the foregoing acts;

(f) Attempting to cause others to refrain from doing business with plaintiff;

(g) Taking any action which would interfere with this court's jurisdiction in the premises.

And it is further ORDERED that the members of defendant union and all persons in the class or craft represented by it, insofar as they are acting in concert with respect to the matters involved in this case, are hereby directed to continue their normal employment for plaintiff railroad; PROVIDED, however, that nothing herein shall be construed to require an individual employee, not acting in concert with others, to render labor or service without his consent or to make the quitting of his labor or service by an individual employee an illegal act;

And it is further ORDERED that defendant BLF&E, its local lodges, and its officers, agents, servants and employees, shall issue such instructions to their members as shall be necessary to insure compliance with this Order.

It is further ORDERED that plaintiff give security in the sum of $10,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this Order; and plaintiff having tendered a

surety bond in that amount, the same is hereby approved;

It is further ORDERED that this cause remain pending upon the remaining issues, until further order of this court;

And it is further ORDERED that copies of this Order be served upon such of the defendants as are within the jurisdiction of this court and have not entered their appearance herein, and that such service may be made by any person over the age of 21 years who is not a party to the action.

Done and Issued at Portland, Oregon, this 4th day of March, 1968, at 12 o'clock noon.

(Sgd.) GUS J. SOLOMON, *Judge*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNION PACIFIC RAILROAD COMPANY, a corporation,
Plaintiff,
vs.
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, et al.,
Defendants,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Intervenor.

Civil No. 68-105
STIPULATION

IT IS HEREBY STIPULATED that UNION PACIFIC RAILROAD COMPANY may have an extension of time within which to reply or move with respect to the counterclaim on file herein, until ten (10) days after determination of the appeal which is now pending herein from the Preliminary Injunction entered March 4 1968.

DATED April 29, 1968.

RANDALL B. KESTER
Of Attorneys for Plaintiff

DONALD W. MCEWEN
Of Attorneys for Defendant BLF& E

Presented by:

RANDALL B. KESTER
Of Attorneys for Plaintiff

IT IS SO ORDERED, this 29th day of April, 1968.

/s/ JOHN F. KILKENNEY, *Judge*